No. 77-948

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH N. ZANNINO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. 1).

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1977. A petition for rehearing was denied on November 4, 1977. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to January 3, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the prosecutor fulfilled his obligations under the plea agreement.

2. Whether the district court was required to accept the sentencing recommendation of the prosecutor.

3. Whether the court based petitioner's sentence on unreliable information, without informing petitioner of the source and substance of the information or providing him with an opportunity to rebut it.

STATEMENT

Following a plea of guilty in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of conspiracy and interstate travel to commit arson, in violation of 18 U.S.C. 371 and 1952, and sentenced to six years' imprisonment and to pay a $10,000 fine.[1] The court of appeals affirmed (Pet. App. 13-15).

Before accepting petitioner's guilty plea, the court determined that he understood the nature of the charges, the possible sentences that he could receive, and the effect of the plea on his constitutional rights. Having determined that petitioner's guilty plea was knowingly, intelligently, and voluntarily made, the court accepted the plea (Tr. I, 8).[2] At that point the Assistant United States Attorney disclosed the existence and details of a plea agreement that previously had been reached between the government and petitioner. The agreement provided that if petitioner would enter guilty pleas to counts one and three of the indictment and "would then fully cooperate with the government and testify truthfully and honestly in

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[1]Co-defendants Ronald E. Light and Herman Pinnon also pleaded guilty and received identical sentences.

[2]"Tr. I" refers to the transcript of the arraignment and proceedings on October 14, 1976, January 5, 1977, February 25, 1977, and March 4, 1977. "Tr. II" refers to the sentencing transcript of March 11, 1977.

the event this case goes to trial * * * at the time of sentencing the government would recommend five years' probation, [and] a ten thousand dollar fine * * *." In response, the court made it explicitly clear that the agreement was not binding on it (Tr. I, 8-11) and that should the court, after examining the presentence report, decide to impose a sentence different from that contemplated by the agreement, petitioner "can withdraw his plea and change it and some other judge would hear it" (Tr. I, 10).

Thereafter, on February 25, 1977, the court informed petitioner that it would not accept the plea bargain but would impose a sentence less favorable than that contemplated by the agreement. The court stated that it reached its decision after reading an official statement of the offense as well as the presentence reports of petitioner and the other two co-conspirators.[3] The court then gave petitioner an opportunity to withdraw his plea and proceed to trial before a different judge (Tr. I, 19, 23). Petitioner declined to do so (Tr. I, 26).

On March 11, 1977, petitioner appeared before the court for sentencing. At that time the government, citing petitioner's cooperation as the consideration for the agreement, again advised the court of the terms of the plea bargain and recommended a sentence of five years' probation and a $10,000 fine, in accordance with that agreement (Tr. II, 2). While acknowledging that his client could legally receive the same sentence as was imposed upon the co-defendants (Tr. II, 8), petitioner's counsel urged the court that it reconsider its decision to impose a

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[3]Petitioner's assertion (Pet. 31) that the district court relied on statements made by counsel for his co-defendants at their sentencing is without support in the record.

prison term and grant probation instead (Tr. II, 9). The court, however, having determined that petitioner was more deeply involved in the criminal activity than he had admitted,[4] sentenced him to a total term of six years' imprisonment and to pay a $10,000 fine, the same sentence that it imposed on the other two co-conspirators (Tr. II, 27-29).

The district court left open the possibility of a reduction in sentence if evidence was submitted to the court indicating that its assessment of the extent of petitioner's involvement in the offense was wrong (Tr. II, 27). Pursuant to petitioner's request, the court further stated its intent to request, through the United States Attorney, that petitioner be given a polygraph test by the FBI to substantiate his version of the arson (Tr. II, 30). On March 22, 1977, petitioner appeared at the Harrisburg, Pennsylvania, office of the FBI, and a lie detector test was administered; copies of the examination results were forwarded by the United States Attorney to the district court and to petitioner. The court made no change in sentence after receipt of this report.

ARGUMENT

1. Petitioner contends (Pet. 32) that the prosecutor failed to recommend effectively that the court accept the plea or to contradict the court's belief as to the extent and nature of petitioner's culpability. None of these contentions was raised at any of the hearings below. Indeed, at

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[4]Petitioner stated that his participation was limited to introducing co-defendant Light, an arsonist, to co-defendant Pinnon, who was looking for somebody to burn down his business, and to driving them from Maryland to Pennsylvania, and then to and from the premises on the day of the fire (Tr. I, 15-16). See note 7, *infra*.

sentencing, petitioner's counsel stated his belief that the prosecutor "as he has always done, acted in completely good faith" (Tr. II, 4).

In any event, an examination of the record demonstrates that petitioner's claims are baseless. On two occasions (one of which was at sentencing) the prosecutor informed the court of the precise terms of the plea agreement and urged the court to accept them (Tr. I, 8-9; Tr. II, 2). The court acknowledged that the prosecutor had fulfilled his obligation under the bargain, and defense counsel himself expressed the belief that the prosecutor had acted properly (Tr. II, 4).

The prosecutor was not required, by the terms of the agreement or otherwise, to substantiate petitioner's version of the crime, to repudiate the versions given by the co-defendants, or to insist that the court accept the sentence recommendation. In pertinent part, Fed. R. Crim. P. 11 provides only that the terms of the agreement should be announced to the court and, in the event the agreement is rejected by the court, that the defendant be given an opportunity to withdraw his plea. Both of these requirements were satisfied in this case.

2. Petitioner also contends (Pet. 28-37) that the district court abused its discretion in rejecting the sentencing terms of the plea agreement and offering petitioner the opportunity to withdraw his guilty plea and proceed to trial. But the law is clear that sentencing determinations lie solely within the discretion of the court. Rule 11 explicitly provides that the sentencing court is not bound by the agreement reached by the prosecutor and the defendant. In discussing Rule 11, the Advisory Committee on Rules states: "The proposed plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the

discretion of the individual trial judge." 52 F.R.D. 409, 429. See also *United States* v. *Maggio*, 514 F. 2d 80, 89 (C.A. 5); *United States* v. *Dixon*, 504 F. 2d 69, 72 (C.A. 3); *United States* v. *Hernandez-Salazar*, 471 F. 2d 1209 (C.A. 9). Here there was no abuse of discretion.[5]

3. Petitioner finally contends (Pet. 32-33) that the court's consideration of the presentence reports of his co-defendants at the time of his sentencing was improper because, he alleges, he was neither informed of the source and nature of the information in these reports nor given an opportunity to rebut that information. These claims are not substantiated by the record.

At the time of sentencing the court suggested that it was basing its decision in part upon information from the probation department that petitioner had a more substantial role in the arson than he had admitted (Tr. II, 25).

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[5]Neither *United States* v. *Ammidown*, 497 F. 2d 615 (C.A. D.C.), nor *United States* v. *Cowan*, 524 F. 2d 504 (C.A. 5), certiorari denied *sub nom. Woodruff* v. *United States*, 425 U.S. 971, which are cited by petitioner, requires a contrary finding. Those cases merely hold that the decision as to which offense should be charged against the accused is basically a prosecutorial function. See also *Bordenkircher* v. *Hayes*, No. 76-1334, decided January 18, 1978 (slip op. 7). *Ammidown* in fact recognized that "imposition of sentence is a matter for discretion of the trial judge. The prosecutor has no role beyond the advisory * * *." *United States* v. *Ammidown*, *supra*, 497 F. 2d at 621. See also 8 Moore, *Federal Practice* para. 11.05[4] (2d ed. 1977)).

Palmero v. *Warden, Green Haven State Prison*, 545 F. 2d 286 (C.A. 2), certiorari dismissed, 431 U.S. 911, also cited by petitioner, is equally inapt. There the court of appeals, upholding the district court's finding of "prosecutorial bad faith in negotiations and nonfulfillment of the plea bargain" (*id.* at 294), ordered the defendant's release as "the only meaningful relief in the context of this case" (*id.* at 296). Where, as in the instant case, there has been no prosecutorial breach of the agreement, an order requiring the court to honor the agreement is not proper even under the language of that case.

The record is not specific as to the exact source of this information, although there is a suggestion that it was derived from the official statement of the offense and petitioner's presentence report, both of which petitioner had in his possession, as well as the presentence reports of the co-defendants, which petitioner did not possess (Tr. I, 22). While the court did not provide petitioner with copies of his co-defendants' presentence reports, which are properly regarded as highly confidential (cf. Fed. R. Crim. P. 32(c)(3)),[6] the court informed him of the nature of the allegations against him and the particulars of the conflicting versions of the crime (cf. Fed. R. Crim. P. 32(c)(3)(B)).[7]

Petitioner also was given an opportunity to rebut the information. At petitioner's request, the court authorized the FBI to administer a lie detector test and stated that if petitioner affirmatively demonstrated by means of the test that the information before the court was false, the court would consider a reduction in his sentence. The test was given on March 22, 1977, with questions based on the disputed facts surrounding the offense. A list of the questions and answers as well as an interpretation of the readings was submitted to the Assistant United States Attorney, who forwarded them to the court and to petitioner. On considering this report the court determined not to vacate or reduce petitioner's sentence.[8]

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[6]Petitioner's counsel admitted that "we have no right to see those reports" (Tr. I, 22).

[7]The probation department information indicated that petitioner brought the timing device and actively participated in the commission of the offense (Tr. I, 20-25) and that he persuaded Light not to back out of the plan (Tr. I, 26).

[8]Petitioner argues (Pet. 31-32) that the court of appeals improperly permitted the government to supplement the record on appeal with a copy of the lie detector test and results without permitting petitioner

Under these circumstances it was not inappropriate for the court to consider information that may have been supplied by petitioner's co-defendants. Such information, although in that form not admissible evidence at trial, may nonetheless be included in a presentence report, *Gregg* v. *United States*, 394 U.S. 489, 492; *United States* v. *Garcia*, 544 F. 2d 681 (C.A. 3), and considered at the time of sentencing. The discretion of a sentencing court to consider information concerning the defendant's life and characteristics and the circumstances surrounding the commission of the crime, from whatever source available, is very broad. *Williams* v. *New York*, 337 U.S. 241, 247; *Williams* v. *Oklahoma*, 358 U.S. 576, 584-586. That discretion was not abused in this instance.[9]

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also to supplement the record with his motion requesting a hearing on the polygraph examination. (That motion was not acted upon by the district court.) But at the request of petitioner a copy of that motion was included by the government with the other papers submitted to the court.

[9]Moreover, since petitioner himself admitted that he brought the other two men together, facilitated the carrying out of the scheme, and drove them and the incendiary devices to the scene of the fire (Tr. I, 14-16), he cannot now complain that the punishment, which is well within the statutory limit and no lengthier than that imposed on his co-defendants, is undeserved. Cf. *Dorszynski* v. *United States*, 418 U.S. 424, 431.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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